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No. 83-396

In the Supreme Court of the United States

OCTOBER TERM, 1983

Supreme Court, U.S.
FILED
NOV 18 1983
ALEXANDER L. STEVAS
CLERK

UNITED STATES OF AMERICA, PETITIONER

v.

GILBERT MORENO, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals for the Ninth Circuit erroneously ruled that the evidence seized should have been suppressed and the case reversed based upon the police officer's violation of Title 18 U.S.C. 3109.

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UNITED STATES OF AMERICA, PETITIONER

v.

GILBERT MORENO, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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RESPONDENTS BRIEF

Respondent, Gilbert Moreno, hereby submits this brief in opposition to the Petition for a Writ of Certiorari which seeks to reverse the decision of the Ninth Circuit Court of Appeals.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 701 F.2d 815. The opinion of the District Court of the Southern District of California is not reported. Respondent refers the Court to Petitioners brief for said opinions, at Appendix A and Appendix B respectively.

JURISDICTION

Petitioner seeks to invoke this court's jurisdiction under 28 United States Code section 1254(1). For the reasons outlined below, it is recommended that the court decline to exercise its jurisdiction in this case.

STATUTE INVOLVED

Title 18 United States Code section 3109 provides:

> "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

STATEMENT OF THE CASE

Respondent, based upon a trial submitted on stipulated facts, was convicted on April 23, 1982 of possession of cocaine with intent to distribute it, in violation of Title 21 U.S.C. §841(a)(1), and of conspiracy to commit the same offense, in violation of Title 21 U.S.C. §846.

This trial followed the denial of respondents motion to suppress the evidence seized from his apartment on January 27, 1982, and was for the protection of his right to contest that decision to the Court of Appeal.

Respondent sought suppression of the seized illegal controlled substance, to wit; cocaine, in both the District Court, and the Court of Appeal for the Ninth Circuit, on the grounds, 1. The search warrant was deficient, and 2. The officers executing the warrant violated the provisions of Title 18 U.S.C. 3109.

The Court of Appeal for the Ninth Circuit reversed the conviction of respondent on March 17, 1983, after finding the police officers executing a search warrant had violated the provisions of Title 18 U.S.C. 3109. The Court did not address respondents remaining contention.

The facts of the case, as set forth in the petition, and in the opinion of the Court of Appeal for the Ninth Circuit attached as Appendix A in the petition, are the same facts adopted herein by respondent.

ARGUMENT

Petitioner seeks a review, before this court, of the opinion reached by three learned Justices of the Court of Appeal for the Ninth Circuit. Respondent submits this is a preposterous suggestion.

Petitioner proposes nothing different than the argument made to those Justices, and certainly offers nothing pursuant to Rule 17 of the Rules of the Supreme Court as the basis in reason why this Court should entertain such a review.

Petitioner argues that the Justices are "manifestly erroneous in several critical respects", and that they "erred more egregiously", and further argues that; this holding extends beyond the context of this case and raises questions of broad applicability concerning the proper analysis of fruit of the poisonous tree issues and the appropriate remedy for technical violations of statutes regulating the conduct of law enforcement officers. Nothing could be further from the truth in such an argument.

It is clear in the analysis of the opinion of the Ninth Circuit that its decision will not receive broad application, but will be another of those cases confined to its limited factual circumstances.

Historically, the protection of the privacy of a man's home, from the breaking and entering by the police, was founded in the ancient adage that a man's house is his castle.

Petitioner cites Miller v. United States, 357 U.S. 301. That case reflects on the historical origin of the challenged statute herein, and refers to the requirement of a notice being pronounced in 1603 in Semaymes Case, 56. Rep. 91a, 11E.R.C. 629, 77 ENG. REPR. 194, at 195: "In all cases where the King is party, the Sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the Kings process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors...".

This requirement remains in 18 U.S.C. 3109. This requirement was clearly, and intentionally, violated by the police when they entered the residence of respondent Gilbert Moreno. That intentional, and disrespectful non-compliance with the law of the United States, is no mere technical violation as petitioner wishes this Court to believe. It is a violation that strikes at the very heart and basis of our constitutional protection from unreasonable police conduct.

The initial unreasonable, lawless police intrusion into the respondent's home, cannot thereafter blossom into a fruitful legal conclusion. When such conduct is of a continuing, uninterupted action by police authority it retains its unlawful identification.

The ruling by the Court of Appeal, was after a careful analysis of the government's argument, and that opinion answers correctly each of the petitioners claims herein, United States v. Moreno, 701 F.2d 815.

Mr. Moreno's own testimony reflects the subjective belief of what he felt at the time the officers entered the

outer gate (or door) to his home: "what we heard was we heard the gate slam like somebody was breaking in our house. Usually, most people ring the bell, and we go and unlock it and let them in. This time we heard a slam. Scared every one. My daughter jumped off the balcony and ...", Tr. 22, 23.[1]

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Dated: November 16, 1983

Respectfully submitted.

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Gilbert Moreno

[1] "Tr." refers to the transcript of the suppression hearing.